EMPLOYMENT TRIBUNALS

Claimant: Mr S Andrews

Respondent: Asda Stores Ltd

Heard at: **Bristol (by telephone)** **On:** **31 August 2021**

Before: **Employment Judge Livesey**

Representation:
Claimant: in person
Respondent: Mr Wallace, counsel

JUDGMENT

1. The Claimant's claim was issued out of time under s. 23 of the Employment Rights Act 1996 and/or article 7 of the Employment Tribunal's Extension of Jurisdiction Order 1994, but it was not reasonably practicable for the Claimant to have issued the claim in time and it was issued within a period which was reasonable in all of the circumstances.

2. The complaints of unlawful deductions from wages and/or breach of contract in respect of "*breach in agreed terms of contract*" (£3,812.18) and "*unpaid labour*" (£790.51) are dismissed under rule 37.

3. A deposit order under rule 39 is made in respect of the remaining claim of "*deducted bonus*" (£32.00), the terms of which are set out in the Case Management Order of even date.

REASONS

Background

1. The background to this claim was somewhat complicated.

2. By a Claim Form dated 17 May 2019 (No. 1401913/2019, referred to hereafter as 'Claim 1'), the Claimant issued a claim in respect of a shortfall in his annual bonus, being approximately £32.00. He considered that the bonus had been withheld unreasonably as a result of the issuing of a final written warning.

3. In the Respondent's Response, it referred to its Retail Bonus Policy which

explained that a bonus was discretionary and "*will be reduced on a prorated basis to reflect the number of consecutive days that the warning is live during the bonus year*".

4. The Claimant's employment came to an end on 18 October 2019 and he issued proceedings on 3 April 2020 for unfair dismissal (Claim No. 1401706/2020, 'Claim 2'). A Response to that claim was received on 18 May 2020 in which the Respondent alleged that the claim was out of time.

5. Both matters came before Regional Employment Judge Pirani on 15 September 2020 when he conducted a Case Management Preliminary Hearing. He listed both claims for a further Preliminary Hearing to determine a number of matters; whether Claim 2 had been issued in time, whether the Claimant should pay a deposit in respect of either claim, the determination of Claim 1 (the alleged £32.00 bonus shortfall), costs and further case management.

6. That Preliminary Hearing took place on 27 November 2020 and the following determinations were reached;
    a. Claim 2 had been issued out of time and was dismissed (see, in particular, the conclusions within paragraphs 30 to 35 of the Case Summary of 27 November 2020);
    b. An application to amend Claim 2 was also dismissed which had been made in the following way: The Regional Employment Judge had required the Claimant to provide a Schedule of Loss. On 24 November 2020, the Claimant purported to serve an addendum to his Schedule in which he sought to recover an alleged shortfall in hours worked against his 30 hour per week contract from 2015 to 2019, a figure of £3,812.18. The application was dealt with between paragraphs 36 and 40 of the Case Summary of 27 November 2020. It was dismissed as an attempt to amend either Claim 1 or 2;
    c. Claim 1 was retrospectively rejected because of the Claimant's non-compliance with the early conciliation rules, which neither the Tribunal nor the Respondent had identified until the date of the hearing (see paragraphs 42 to 49 of the Case Summary).

7. On 10 December, the Claimant applied to have the Judgment reconsidered. That application was dismissed on 14 December 2020.

8. Also on 10 December 2020, the Claimant issued this claim ('Claim 3'). Three items of loss were identified within paragraph 9.2 of the Claim Form;
    a. The original £32.00 bonus payment that was sought in Claim 1;
    b. £3,812.18, being the sum referred to in paragraph 6 (b) above;
    c. £790.51, being a sum allegedly owed for "*unpaid labour*" which was not explained further within the body of the document.

9. The Response was filed on 29 January 2021. The Respondent asserted that the claim was out of time and applications under rules 37 and/or 39 were made. This hearing was duly listed.

Legal framework

10. The relevant principles in relation to the Tribunal's jurisdiction (time) of the claim were set out in paragraphs 22 to 29 of the Case Summary of 27 November 2020. These claims were either of unlawful deductions from

wages or for breach of contract, in which case the same statutory tests applied under s. 23 of the Employment Rights Act 1996 and article 7 of the Employment Tribunal's Extension of Jurisdiction Order 1994.

11. In relation to rules 37 and 39, under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a tribunal could strike a claim out if it appeared to have no reasonable prospect of success. It was a two-stage process; even if the test under the rules was met, a judge also had to be satisfied that his/her discretion ought to have been exercised in favour of applying such a sanction. Striking out a claim is a draconian step and numerous cases have reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, *Mbuisa-v-Cygnet Healthcare Ltd* UKEAT/0119/18). In *Balls-v-Downham Market School* [2011] IRLR, Lady Justice Smith made it clear that "no" in rule 37 meant "no". It was a high test. In *Ezsias-v-North Glamorgan NHS Trust* [2007] EWCA Civ 330 the Court of Appeal stated that it would only be in exceptional cases that a claim might be struck out on this ground where there was a dispute between the parties on the central facts. In such a case, the Claimant's contentions must ordinarily be viewed at their highest (*Mecharov,* supra).

12. Alternatively, where a tribunal considered that any specific allegation, argument or claim had little reasonable prospect of success, it could make a deposit order (rule 39). If there was a serious conflict on the facts disclosed on the face of the claim and response forms, it may have been difficult to judge what the prospects of success truly were (*Sharma-v-New College Nottingham* [2011] UKEAT/0287/11/LA). Nevertheless, a judge could take into account the likely credibility of the facts asserted, the likelihood that they might be established at a hearing (*Spring-v-First Capital East Ltd* [2011] UKEAT/0567/11/LA) and/or whether they appeared inherently implausible (*Ahir-v-British Airways* [2017] EWCA Civ 1392).

<u>Discussion</u>

13. The three elements of the claim, as set out in paragraph 8 above, were considered;

15.1 The £32.00 bonus claim;

The claim was clearly out of time but, for the reasons stated within paragraph 48 of the Case Summary of 27 November 2020, it was not reasonably practicable for the claim to have been brought in time. The Claimant *did* bring Claim 1 in time and neither the Tribunal nor the Respondent spotted the error in respect of the early the conciliation procedure until 27 November 2020. If the Claimant had had the claim rejected initially, he could have reissued immediately. His ignorance of the law was entirely reasonable in that respect.

The Judgment and Order of 27 November and rejection of the reconsideration application of 14 December 2020 were all sent to the parties on 19 December 2020 but the Claimant had already issued this claim. He issued it within such further time as was reasonable in all the circumstances.

Mr Wallace further argued that Claim 3 ought to have been rejected

because the early conciliation certificate that was relied upon (R228278/20/52) was a new certificate which had been obtained in December 2020 but covered the same 'matter' which were covered by the same 3 certificates which had been obtained in 2019 (see paragraph 41 of the Case Summary of 27 November 2020). She argued that the Claimant ought to have relied on the first certificate which had been obtained on 26 April 2019 (R137823/19/29).

Although that argument was consistent with Mr Wallace's approach at the last hearing, rule 12 (2ZA) now exhausted to overcome the problems created by those authorities considered in the previous Judgement (see paragraph 47 of the Case Summary of 27 November 2020). It was not in the interests of justice to reject a claim which had not been conciliated once, but four times. The Respondent's arguments were purely technical and the purpose of the early conciliation rules had not been circumvented by the Claimant in the circumstances. The claim ought not to have been rejected.

The matter, however, was further complicated by the fact that the Respondent asserted that a cheque for £32 had been sent to and received by the Claimant in respect of this element of the claim. The Claimant stated that he had *not* received such a cheque and the Respondent's documentation did not demonstrate that payment had been made (page 120). Even if it had been, the Respondent did not concede or consent to a Judgment and the Claimant was entitled to pursue his case to a Judgment, including a declaration.

That, however, was not the end of the matter. As the Respondent pointed out in its Response, its Retail Bonus Policy enabled it to withhold bonus as a result of the existence of a live warning (paragraph 23 of the Response). The Policy had been included in the bundle which the Respondent had prepared for the hearing of Claim 1. It was not clear whether it had (or purported to have) contractual force. The Claimant's contract had not been produced.

The Claimant accepted that the policy existed, albeit that he had been unaware of its terms until the bonus had been withdrawn. He asserted that his union had informed him that his complaint about the withhold bonus '*had legs*', but he was not able to say upon what basis that the review had been expressed.

Whether as a breach of contract or unlawful deductions from wages claim, the Claimant appeared to have an uphill struggle in light of the Respondents written policy. He argued that the written warning had been issued in respect of alleged misconduct which had never been identified as such by his employer. He needed to demonstrate that the policy had been applied capriciously and/or non-contractually, which did not appear to be at all straightforward.

The Claimant had little reasonable prospect of success. It was appropriate and proportionate to make a deposit order in this case. It was not, however, appropriate to make an order for more than the value of the claim and the deposit order was set at £25, the

Claimant having indicated that he had the means to pay it.

15.2 £3,812.18;
The Claimant had attempted to introduce that claim on 24 November 2020 (see paragraph 6 (b) above). The application to amend Claim 1 was dismissed as it was an attempt to introduce an entirely new claim very late (paragraph 40.1 of the Case Summary). If the claim was out of time then, it was also out of time now. An attempt to reintroduce it was, arguably, also an abuse of the process. It was dismissed under rule 37 as it had no reasonable prospect of success and/or because it is vexatious (rule 37 (1)(a) and/or (b));

15.3 £790.51, being a sum allegedly owed for "*unpaid labour*" which was not explained further within the body of the document.

The Claimant explained during the hearing that that element related to changes to his hours as recorded on the 'punch in/out' machine. If, he said for example, he had been rostered to work for 8 hours but had been delayed and had actually worked for 10 hours, 10 hours would have been 'punched in' but the Respondent then altered the hours in store and deducted the extra 2 hours worked.

The Claimant's case was that he suffered losses over his 5 years of employment from 2014 to 2019. He stated that he had discovered each deduction within a week of the payments of his wages for each shift, the last deduction having been made in April or May 2019. He had first come to realise that the deductions were being made in mid-2017 but only had an '*overview*' of all of the payments when the Respondent's 'Privacy Team' released documents to him. He could not say when that had been.

This claim was also out of time and was dismissed. Although the Claimant had an overview of all payments more recently, he had known of each deduction within days of it having been made, the last one having been made in April or May 2019, 18 months before the claim was issued in December 2020. He Claimant's reason for delay was poorly explained and there was no basis for concluding that it had not been reasonably practicable for the claim to have been issued sooner.

Employment Judge Livesey
Date 31 August 2021

Judgment & Reasons sent to the parties: 15 September 2021

FOR THE TRIBUNAL OFFICE